

ARKANSAS SUPREME COURT

No. CR 05-643

NOT DESIGNATED FOR PUBLICATION

STEVEN ELLIS
Appellant

v.

STATE OF ARKANSAS
Appellee

Opinion Delivered September 21, 2006

APPEAL FROM THE CIRCUIT
COURT OF CLARK COUNTY, CR
2002-217, HON. JOHN ALEXANDER
THOMAS, JUDGE

AFFIRMED

PER CURIAM

Appellant was convicted by a jury of residential burglary, theft of property, aggravated robbery, and first-degree terroristic threatening. He received an aggregate sentence of 744 months' imprisonment. Appellant was found not guilty on a charge of second-degree battery. The Arkansas Court of Appeals affirmed. *Ellis v. State*, CACR 03-938 (Ark. App. May 26, 2004).

Subsequently, appellant timely filed in the trial court a *pro se* petition for postconviction relief pursuant to Ark. R. Crim. P. 37.1. After several months, appellant's newly-hired counsel filed an entry of appearance in the matter on February 28, 2005. By separate letter to the trial court dated the same day, counsel informed the trial court that he intended to file an amended Rule 37.1 petition and requested that the trial court withhold making a ruling until after that time. On April 6, 2005, the trial court denied appellant's *pro se* petition without a hearing. Two days later, appellant's counsel filed a motion for leave to file an amended and substituted petition, and filed an amended and substituted petition. On May 2, 2005, the following documents were filed in the matter: (1)

appellant's motion to set aside and vacate the trial court's order denying appellant's Rule 37.1 petition filed by appellant's counsel; (2) the trial court's order granting appellant's motion to set aside the previous order denying appellant's Rule 37.1 petition, and granting appellant's motion for leave to file an amended and substituted petition, both filed by appellant's counsel; (3) the trial court's order denying appellant's original *pro se* petition, and denying the amended and substituted Rule 37.1 petition filed by appellant's counsel; (4) appellant's notice of appeal.

Initially, the State contends that appellant's notice of appeal related only to the trial court's April 6, 2005, order denying appellant's *pro se* Rule 37.1 petition. The State maintains that the trial court lost jurisdiction to vacate and set aside that order because appellant's counsel's later Rule 37.1 amended and substituted petition was tantamount to a motion for reconsideration.

Here, appellant's counsel's motion for leave to file an amended and substituted petition was untimely as the trial court made its ruling on appellant's original *pro se* petition prior to the motion for leave being filed. Ark. R. Crim. P. 37.2(e). Further, once the trial court made its ruling on appellant's *pro se* petition, the ruling became final and could not be expanded to include any points contained in appellant's counsel's amended and substituted petition. Ark. R. Crim. P. 37.2(d). As a result, appellant's notice of appeal related only to the trial court's April 6, 2005, order denying appellant's original *pro se* petition.

Next, we turn to the trial court's order denying appellant's original *pro se* petition for Rule 37.1 postconviction relief. The trial court's order did not make written findings of fact and conclusions of law as required by Ark. R. Crim. P. 37.3(a). Without exception, we have held that this rule is mandatory and requires written findings. *Dulaney v. State*, 338 Ark. 548, 999 S.W.2d 181 (1999) (*per curiam*). If the trial court fails to make the required findings in accordance with the

Rule, it is reversible error. *Morrison v. State*, 288 Ark. 636, 707 S.W.2d 323 (1986). For these reasons, the circuit court's order is clearly erroneous. If, however, the record before this court conclusively shows that the petition is without merit, we will affirm despite the circuit court's failure to make written findings. *Wooten v. State*, 338 Ark. 691, 1 S.W.3d 8 (1999).

We do not reverse a denial of postconviction relief unless the trial court's findings are clearly erroneous or clearly against the preponderance of the evidence. *Greene v. State*, 356 Ark. 59, 146 S.W.3d 871 (2004). A finding is clearly erroneous when, although there is evidence to support it, the appellate court after reviewing the entire evidence is left with the definite and firm conviction that a mistake has been committed. *Flores v. State*, 350 Ark. 198, 85 S.W.3d 896 (2002).

To prevail on a claim of ineffective assistance of counsel, appellant must show that counsel's representation fell below an objective standard of reasonableness and that but for counsel's errors, the result of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984); *Andrews v. State*, 344 Ark. 606, 42 S.W.3d 484 (2001) (*per curiam*).

On appeal, appellant, who is limited to the arguments contained in his original *pro se* petition,¹ argued that trial counsel was ineffective for: (1) failure to include the bracketed portion of AMI Crim. 2d 203 in his jury instructions; (2) failure to seek an admonishment or a mistrial after the prosecutor made certain statements during closing arguments; (3) failure, with regard to the racial make-up of the jury panel, (a) to argue the issue on appeal, (b) to scrutinize the jury selection process that led to a fewer number of African-Americans on the jury panel or venire than the racial

¹In his Rule 37.1 petition, appellant additionally claimed that he entered a plea of not guilty and proceeded to trial as a result of his counsel's failure to explain the ramifications of the amended information filed by the State to charge appellant as a habitual criminal. Appellant abandoned this claim on appeal. Issues raised below but not argued on appeal are considered abandoned. *Jordan v. State*, 356 Ark. 248, 147 S.W.3d 691 (2004).

composition of Clark County voters.

The charges against appellant stemmed from a 2002 residential burglary in Arkadelphia. The victim was beaten, tied up, and was told by his assailants that he would be killed. The assailants then stole the victim's money and vehicle. The victim identified his assailants as appellant and another man, Roy Harrison.

At trial, Harrison testified that he and appellant planned the attack for some time with the purpose of stealing the victim's car. Harrison also testified that both men wore gloves during the assault, and that Harrison prevented appellant from killing the victim as appellant had planned to do.

Appellant testified on his own behalf during the trial. He denied involvement in the matter. Appellant stated that when he was 17 years old, he was arrested as a result of his fingerprints being on a stolen vehicle. He entered a plea of guilty for theft of property and served time for that crime. During cross examination, appellant admitted that he was also charged with breaking and entering, and first-degree criminal mischief in the same theft-of-property incident. He also admitted that he was involved in a criminal battery incident when he was in junior high school.

The instructions given to the jury included AMI Crim. 2d 203, which was given without including the final bracketed portion. Appellant's counsel did not object or request that the additional bracketed section be included in the instruction. This jury instruction states:

AMI Crim. 2d 203 – Previous Conviction – Impeachment

Evidence that a witness has previously been convicted of [a crime] [crimes] may be considered by you for the purpose of judging the credibility of the witness [but not as evidence of guilt of the defendant].

During the State's initial closing arguments, the prosecutor referred to the lack of appellant's

fingerprint at the scene of the crime as not being dispositive of appellant's innocence. The prosecutor referred to the "lesson" that appellant learned during his prior crime when he was identified through his fingerprint, causing appellant to wear gloves for this crime. Along that vein, the prosecutor also argued:

Now what's the lesson that he's learned from this latest? Don't leave a witness. Next time, he will pull the trigger. He is a convicted felon. He's done breaking and entering. He's charged with burglary now. He's done battery. He's charged with battery now. He's done theft. He's charged with theft now.

At that point, trial counsel objected to the prosecutor's argument, claiming that the State was inviting the jury to convict appellant based on his prior crimes. In response, the prosecutor contended that the instructions related to appellant's credibility as a witness, and that the argument was not improper. The trial court overruled appellant's objection and no further action was requested by trial counsel.

Appellant now claims that trial counsel was ineffective for failing to include the last bracketed portion of AMI Crim. 2d 203 in his jury instructions, and for failing to seek an admonishment or a mistrial after the prosecutor made the statements set forth above during closing arguments. There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Noel v. State*, 342 Ark. 35, 26 S.W.3d 123 (2000). To rebut this presumption, appellant must show that there is a reasonable probability that the decision reached would have been different absent the errors. *Greene v. State*, 356 Ark. 59, 146 S.W.3d 871 (2004).

As to trial counsel's failure to request the last bracketed portion of AMI Crim. 2d 203, appellant must show that the result of the guilt phase of the trial would have been different but for the actions of trial counsel. In this case, there was overwhelming evidence of appellant's guilt

introduced at trial, including identification testimony from the victim and Harrison. Assuming that the additional bracketed portion of the jury instruction had been included, appellant would not have been able to overcome the evidence introduced proving his guilt. Thus, appellant has not shown that prejudice resulted from trial counsel's actions.

Next, as to the prosecutor's closing arguments, the court of appeals did not find the prosecutor's comments to be improper in affirming appellant's direct appeal. Trial counsel is not ineffective for failing to make an argument that is meritless, either at trial or on appeal. *Greene, supra*. As a result, appellant has failed to show that trial counsel rendered ineffective assistance to appellant on this point by failing to request an admonition or a mistrial.

Finally, regarding appellant's claims pertaining to the racial composition of the jury venire, we find no error and affirm. Appellant's allegations are based on the false premise that he is entitled to African-Americans on the jury because he is African-American and that the jury should mirror the racial makeup of the county from which it is drawn. An African-American defendant is not entitled to a jury containing members of his race or to demand a proportionate number of his race on a venire or jury roll. *See Waters v. State*, 271 Ark. 33, 607 S.W.2d 336 (1980).

Moreover, even if appellant's counsel were to have shown that African-Americans were under-represented on his jury venire, appellant must then have shown that the alleged misrepresentation of African-Americans was due to a systematic exclusion in the jury-selection system itself. *State v. Fudge*, ___ Ark. ___, ___ S.W.3d ___ (May 26, 2005); *Lee v. State*, 327 Ark. 692, 942 S.W.2d 231 (1997) (citing *Duren v. Missouri*, 439 U.S. 357 (1979)). Where the venire is chosen using the random-selection process required by Ark. Code Ann. §16-32-103 (Repl.1999), as confirmed by the State in this matter, we have held that there is no possibility of a systematic or

purposeful exclusion of any group. *Id.*; *Price v. State*, 347 Ark. 708, 66 S.W.3d 653 (2002).

Appellant offered no evidence of purposeful exclusion. Instead, he argued only that “as a life-long resident of Clark County[, appellant] is more than sure that out of a panel of 69 prospective [jury] members that includes only four blacks is not an accurate reflection of the registered voters in Clark County.” As appellant has not met his burden of establishing a *prima facie* case of purposeful discrimination, his counsel was not ineffective for failing to raise the issue on appeal or for failing to examine the jury selection process.

Affirmed.